UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

IN THE MATTER OF:	:	CASE NUMBER: R05-42517-PWB
MICHAEL M. MCKENZIE,	:	
Debtor.	:	IN PROCEEDINGS UNDER CHAPTER 7 OF THE BANKRUPTCY CODE
STRONG INDUSTRIES, INC.,	:	
Plaintiff	:	
v.	:	ADVERSARY PROCEEDING NO. 05-5008
MICHAEL M. MCKENZIE,	:	
Defendant.	:	

ORDER ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Strong Industries, Inc. ("Plaintiff") seeks a determination that a pre-petition judgment obtained by it against the Debtor is nondischargeable pursuant to 11 U.S.C. § 523(a)(6). For the reasons stated herein, the motion is denied.

Prior to filing bankruptcy, the Debtor owned and operated Cartersville Pool & Leisure ("CP&L"), an unincorporated business. In the course of operating his business, the Debtor entered into an agreement with the Plaintiff, a manufacturer and supplier of ready-built pools and spas, to become a licensed dealer of the Plaintiff's pool products. The Debtor was personally liable for the debt. After the Debtor defaulted under the terms of the agreement, the Plaintiff brought suit against the Debtor in the Superior Court of Bartow County, Georgia, in *Strong Industries, Inc. v. Michael McKenzie d/b/a Cartersville Pool & Leisure and Recreational Interiors, and Southern Leisure Products, Inc.*, Civil Action File No. 04CV2497. On July 1, 2005, after a bench trial, the

Superior Court entered an Order and Judgment which contained the following conclusions of law:

> 1. The Court FINDS by a preponderance of the evidence that Michael McKenzie signed the purchase order (Plaintiff's Exhibit 4) in his individual capcity and not as a representative or agent for any corporation or other legal entity. By failing to register the trade name Cartersville Pool & Leisure, the Court FINDS that Cartersville Pool & Leisure must be considered a trade name or d/b/a for Michael McKenzie personally. Therefore, the Court FINDS by a preponderance of the evidence that Michael McKenzie individually and Michael McKenzie d/b/a Cartersville Pool & Leisure are liable to the Plaintiff under Count I of the Plaintiff's complaint for breach of contract.
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> 2. The Court FINDS that the parties presented conflicting evidence of whether Michael McKenzie d/b/a Cartersville Pool & Leisure converted Plaintiff's property. Because the evidence showed that employees or agents of Michael McKenzie d/b/a Cartersville Pool & Leisure sold some of Strong's pools, the Court FINDS that, with respect to the pools sold, Michael McKenzie individually and Michael McKenzie d/b/a Cartersville Pool & Leisure have converted Plaintiff's property as defined by Georgia law. Therefore, Michael McKenzie individually and Michael McKenzie d/b/a Cartersville Pool & Leisure are liable to the Plaintiff under Court III of Plaintiff's complaint for conversion.

The July 1, 2005 Order awarded the Plaintiff damages in the amount of $55,287.42 and post-judgment interest at the statutory rate against the Debtor.

The Plaintiff now seeks summary judgment on its complaint that the judgment debt based upon conversion is nondischargeable pursuant to 11 U.S.C. § 523(a)(6) based upon principles of collateral estoppel. The Debtor has not filed a response to the motion for summary judgment.

The doctrine of collateral estoppel applies to dischargeability proceedings. *Grogan v. Garner*, 498 U.S. 279, 284 n.11 (1991); *see also In re Bilzerian*, 100 F.3d 886, 892 (11th Cir. 1996). If the prior judgment was rendered by a state court, the collateral estoppel law of that state must be applied to determine the judgment's preclusive effect. *In re St. Laurent*, 991 F.2d 672, 675-676 (11th Cir. 1993).

Under Georgia law, as applicable in a dischargeability proceeding in a bankruptcy court,

the party invoking collateral estoppel must establish that 1) the issue in the prior action and the issue before the bankruptcy court are identical; 2) the bankruptcy issue was actually litigated in the prior action; 3) the determination of the issue in the prior action was a critical and necessary part of the judgment in that litigation; and 4) the burden of persuasion in the dischargeability proceeding is not significantly heavier than the burden of persuasion in the prior action. *In re Bush*, 62 F.3d 1319, 1322 (11th Cir. 1995). "While collateral estoppel may bar a bankruptcy court from relitigating factual issues previously decided in state court, however, the ultimate issue of dischargeability is a legal question to be addressed by the bankruptcy court in the exercise of its exclusive jurisdiction to determine dischargeability." *In re St. Laurent*, 991 F.2d at 676 (*citing In re Halpern*, 810 F.2d 1061, 1064 (11th Cir. 1987)). Exceptions to discharge are construed narrowly, but such construction is not so narrow as to eviscerate § 523(a)'s purpose of preventing a debtor from avoiding, through bankruptcy, the consequences of wrongful conduct. *E.g., In re Ellison*, 296 F.3d 266, 271 (4th Cir. 2002).

The first issue in determining applicability of collateral estoppel is whether there is an identity of issues between those litigated in the prior action and those material to this dischargeability proceeding. Section 523(a)(6) excepts from discharge any debt "for willful and malicious injury by the debtor to another entity or the property of another entity." 11 U.S.C. § 523(a)(6). The Supreme Court has held that because the word "willful" modifies the word "injury," a finding of nondischargeability requires "a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury." *Kawaauhau v. Geiger*, 523 U.S. 57, 61 (1998) (emphasis in original). Thus, negligent or reckless conduct does not fall within the "willful and malicious injury" exception to discharge. Under § 523(a)(6), the debtor must intend the consequences of an act and not simply the act itself. *Id.*, 523 U.S. at 61-62, 118 S.Ct. at 977 (*citing* RESTATEMENT (SECOND) OF TORTS § 8A cmt. a (1964)). A "malicious" injury is one which is

"wrongful and without just cause or excessive even in the absence of personal hatred, spite or ill-will." *Hope v. Walker (In re Walker)*, 48 F.3d 1161, 1164 (11th Cir. 1995) (citations omitted). Malice may be implied or constructive. *Id*.

Under Georgia law, conversion "consists of an unauthorized assumption and exercise of the right of ownership over personal property belonging to another, in hostility to his rights; an act of dominion over the personal property of another inconsistent with his rights; or an unauthorized appropriation." *In re Moir*, 291 B.R. 887, 892 (Bankr. S.D. Ga. 2003) (*quoting Adler v. Hertling*, 215 Ga.App. 769, 772, 451 S.E.2d 91 (1994)). However, as the *Moir* court observed, not all judgments for conversion are nondischargeable as willful and malicious injuries under § 523(a)(6), because a conversion can arise from a reckless or negligent act. *Id*. (*citing Kawaauhau v. Geiger*, 523 U.S. 57, 118 S.Ct. 974 (1998)). Thus, a finding of nondischargeability cannot rest solely on a state court judgment for conversion; there must be some indication that the elements of willfulness, wrongfulness and intentionality have been satisfied.

The documents provided by Plaintiff in the record are not sufficient to permit the Court to decide the legal question of whether there is an identity of issues between the judgment for conversion in the Superior Court and the elements necessary for proving the Plaintiff's judgment is nondischargeable pursuant to § 523(a)(6). Although the Plaintiff has attached a copy of the Court's judgment, the judgment contains no factual findings or conclusions regarding intentionality or willfulness by the Debtor and there is no other evidence, such as the trial transcript, from which to glean such required elements.

Because the Court cannot determine as a matter of law that an identity of issues exists between those litigated in the prior action and those material to this dischargeability proceeding, entry of summary judgment is inappropriate. Accordingly, it is

ORDERED that Plaintiff's Motion for Summary Judgment is **DENIED** without

prejudice; and it is

FURTHER ORDERED that Plaintiff is hereby granted leave to file a new motion for summary judgment attaching supplemental supporting documentation no later than May 31, 2006. Alternatively, the Plaintiff may contact Chambers to request this matter be set for trial.

The Clerk is directed to serve copies of this Order on the persons on the attached Distribution List.

At Rome, Georgia, this _____ day of May, 2006.

PAUL W. BONAPFEL
UNITED STATES BANKRUPTCY JUDGE

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